

*United States Court of Appeals
for the Second Circuit*



APPENDIX

75-1011

To be argued by
PHYLLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee, :

-against- :

Docket No. 75-1011

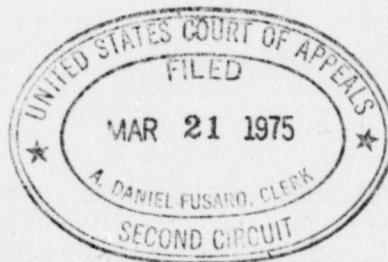
ALPHONSE M. MEROLLA
and THOMAS McNAMARA,

Appellants. :

-----x

APPENDIX TO THE BRIEF
FOR APPELLANT MEROLLA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ALPHONSE M. MEROLLA
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLLIS SKLOOT BAMBERGER,
Of Counsel

1

CRIMINAL

DOCKET

TITLE OF CASE

THE UNITED STATES

vs.
 JOHN DE LISO,
 JOHN MC NAMARA,
 THOMAS MC NAMARA,
 ALPHONSE MEROLLA,
 ANGELO MEROLLA, and
 ROCCO MEROLLA

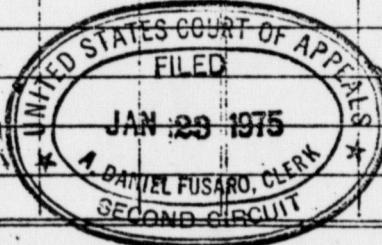
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ATTORNEYS

For U.S.: J. McNAMARA :
 GRUNEWALD, TURK & GILLEN
 16 Court Street, Bklyn, N.Y.
 (858-6464)
 for deft. T. McNamara
 Leonard J. Mieselman
 170 Old Country Rd
 For Defendant: Mineola, NY.
 516-248-2400

Interfering with commerce by extortion.

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine, (Thomas McNamara)	5000.00	1-3-75	Notice of Appeal (no fee)		7
Clerk,			Alphonse Merolla		7
Marshal,		1-14-75	Notice of Appeal (Thomas)	5-	5
Attorney,		1-15-75	Paid to TRERS [unclear]	5-	5
Commissioner's Court,					
Witnesses,					



 UNITED STATES COURT OF APPEALS
 FILED
 JAN 29 1975
 DANIEL FUSARO, CLERK
 SECOND CIRCUIT

DATE	PROCEEDINGS
5-2-73	Before Judd J - Indictment sealed by the Court - Bench Warrant Ordered.
5-2-73	Bench Warrant Issued.
5/8/73	Before DOOLING, J. - Case called- Sealed indictment ordered open by the Court-Deft T. MC NAMARA not present in hospital-Bench Warrant cancelled -Defts JOHN DEELISO, ALPHONSE MEROLLA, AGNELO MEROLLA and R. MEROLLA and counsel present-(and deft J. MC NAMARA)-Defts produced on a bench warrant and arraigned and enter pleas of not guilty-Defts to post a P.A. Bond in the amounts of \$10,000.00 -Bail limits as to ALPHONSE MEROLLA extended to include Penn. upon prior notice to govt-Deft ALPHONSE MEROLLA to surrender his Passport to the U.S.-Bail limits to J. MC NAMARA to be extended upon prior notice to govt.-Initial conference scheduled for 6/8/73

73 CR 442

DATE	PROCEEDINGS
5/8/73	Bench Warrant retd and filed. Executed as to all deft but T. MC NAMARA.
5/8/73	Notice of Appearances filed (for defts T. McNAMARA and R. MEROLLA)
5/17/73	Before DOOLING, J.- Case called- Deft T. MC NAMARA not present-Counsel J. Hoey present-Deft in hospital-Pleading adjd to 5/24/73 .
5/17/73	Notice of Appearance filed. (for deft MC NAMARA)
5-24-73	Before DOOLING J - Case called - Deft McNAMARA & counsel Joseph Hoey present - deft arraigned and enters a plea of not guilty - Bail continued
6-1-73	Notice of Motion filed for Bill of Particulars, Inspection, etc. & Memo in support of pre trial motions (deft McNamara)
6/1/73	Notice of Motion filed for Discovery and Inspection , etc. & Memo in support filed.
6/1/73	Notice of Motion filed, re: Bill of Particulars, Inspection, etc. (deft ANGELO MEROLLA and ROCCO MEROLLA)
6/4/73	Notice of Motion filed, ret. 6/8/73 filed. re: Bill of Particulars (J. MC
6/7/73	Before DOOLING, J.H - Case called- XXXX Conference held and concluded- Order of defendant's motion for bill of partkiculezz and for discovery g and denied: Hearing on deft MC NAMARA's motifinset for 6/14/73-Trial set week of 1/7/73
6/7/73	Notice of Appearance filed. (J. MC NAMARA)
6/14/73	Before DOOLING, J.- Case called- Motion for Discovery, etc. granted in p and denied in part-Dcft T. MC NAMARE's motion for severance denied.
6-18-73	By DOOLING J - Conference Memorandum Order filed granting and denying motions for Discovery, Bill of Particulars, etc. (see Memo) Trial date Jan. 7, 1974, must be emphasized that in this case the highest importance is attached to making sure that the trial is brief, and that means an exhaustive set of pre-trial hearings will, if necessary, be devoted to reducing the order of magnitude of the proofs.(DE LISO, ANGE ROCCO & ALPHONSE MEROLLA)
6/25/73	By DOOLING, J.- Order filed, that the trial will commence on Jan. 7, 19 (JOHN DE LISO, , et al)
6-28-73	By DOOLING J - Order filed on motion of deft McNamara for Bill of Particulars and Discovery, granted and denied in part; motion for severance is denied without prejudice to renewal, etc. Trial date is January 7, 1974 in court room #8.
7/3/73	Stenographer's transcript of 6/14/73 filed.
7/2/73	Court's Bill of Particulars filed
7-26-73	General Notice of Readiness for Trial filed

1-7-74	Before DOOLING J - case called - defts present with counsel - Trial ordered and BEGUN - Jurors selected and sworn - Defts motion for Mistrial - Motion denied - defts open - Trial contd to Jan. 8, 1974.
1-8-74	Letter of Dec. 28, 1973 filed from David Jordan , Appeals Bureau to Michael Gillen Esq. and letter same date to Hon. Lewis Orgel from David Jordan etc. filed (both recvd from Chambers)
1-8-74	Before DOOLING J - Case called - defts present with counsels - Trial resumed - Trial continued to Jan. 9, 1974.
1-9-74	Before DOOLING J - Case called - defts present with counsel -Trial resumed - trial contd to Jan. 10, 1974.
1-10-74	Before DOOLING, J.- Case called- Defts and counsel present- Trial resume Trial contd to 1-11-74
1-11-74	Before DOOLING, J.- Case called- Defts and counsel present- Trial resumed xxxxxxxxxxxxxxDOOLINGJxxxxxxxxxx Trial contd to 1-14-74
1-14-74	Before DOOLING J - Case called - defts & counsels present - trial resumed - Trial continued to 1-15-74.
1-15-74	Before DOOLING, J.- Case called- Defts and counsels present- Trial resume Trial contd to 1-17-74
1-17-74	Before DOOLING J - Case called - trial resumed - defts & counsels present - Trial continued to Jan. 18, 1974.
1-18-74	Before DOOLING J - case called - trial resumed - Govt rests - Defts move for Judgment of Acquittal - decision reserved- R.Fischett, Esq. moves to strike testimony of Taibi - denied. Trial contd to Jan. 21, 1974.
1-21-74	Before DOOLING J - case called - trial resumed - defts rest- defts move for Judgment of Acquittal - motion denied.
1-21-74	Request No. 1, Request No. 2 and Request No. 3 filed.
1-22-74	Before DOOLING J - Case called - trial resumed - defts summation- Govts summation - defts move for declaration of a Mistrial - Motion denied - trial contd to Jan. 23, 1974.
1/23/74	Before DOOLING, J.- Case called- Trial resumed- Jury deliberates to 1/24/74
1/23/74	By DOOLING, J.- Order of Sustenance filed.
1-24-74	12 volumes of stenographers transcripts filed (pgs 1 to 2124)
1-24-74	Before DOOLING J - case called - trial resumed - Jury deliberation resumed Jury reports disagreement - defts move for Mistrial - Motion denied (Allen Charge given) Order of Sustenance signed.

DATE	PROCEEDINGS
	Jury returns with a verdict of guilty as to defts JOHN & THOMAS McNAMARA & ALPHONSE MEROLLA and with a verdict of not guilty as to defts ANGELO & ROCCO MEROLLA and report unable to arrive at a verdict as to deft JOHN DE LESO. Defts. JOHN & THOMAS McNAMARA, ALPHONSE MEROLLA & DELISO move for a Mistrial - Motion granted - Mistrial declared - Trial concluded - Jury discharged - Bail exonerated as to defts ANGELO AND ROCCO MEROLLA - defts JOHN & THOMAS McNAMARA, DE LISO, ALPHONSE MEROLLA contd on bail.
1-25-74	2 Orders of Sustenance filed (for lunch and transportation)
1-24-74	By DOOLING J - & Judgment of Acquittal filed (ANGELO & ROCCO MEROLLA)
1-28-74	Govts Memorandum of Law filed.
1-28-74	Stenographers transcript filed dated Jan. 24, 1974. (pgs 2125 to 2180a)
2-1-74	XXXXXXXXXXXXXX Goths Memorandum of Law filed.
3-11-74	Before Dooling J - case called - Conference held and contd to March 21, 1974. Alphonse
3-21-74	Before DOOLING, J.- Case called- Defts DeLiso and Merolla and counsel John Fishetti present-Deft McNamara and counsel Gillen present- Deft Thomas McNamara not present. counsel Hoey present-Defts after being advised of their rights by the court, Mr. Hoey for Thomas McNamara waive their right to a trial within 90 days of disagreement-Scheduled for trial on 10-7-74 Pre-trial conference scheduled for 9-3-74
3-22-74	Copy of letter filed received from Chambers to John Leone Esq. stating trial date of this case was set for Oct. 7, 1974 and Govt moved without objection to consolidate the trial of 73 CR-1066 with the retrial - and presently scheduled trial date of April 29, 1974 for 73 CR-1066 as released (letter in this file)
5-2-74	Letter dated 4-30-74 filed from J. Timothy Shea, Esq. re deft McNamara indicating that deft wishes to inform the court re 2 weeks vacation, etc. (received from Chambers)
5-10-74	BY DOOLING J Order of substitution filed (substituting Leonard J. Meiselman, Esq. for deft/McNamara in place of John Hoey, Esq.)
6-1-74	Letter from Judge Dooling to deft Alphonse Merolla filed re:ability of deft to retain counsel
7-8-74	Return receipt from Alphonse Merolla filed.
7-23-74	Memorandum to all counsel filed signed by Judge Dooling that a conference is scheduled for Tuesday, Sept. 3, 1974 at 10:00 am. The trial of this case is scheduled for Monday, Oct. 1, 1974 at 10:00 am.

8-26-74	Copy of letter filed dated 8-26-74 to deft Merrolla, Alphonse , from Judge Dooling to the effect that Pre Trial Conference is scheduled on Sept. 3, 1974 and presence of the deft is expected.
9-3-74	Before DOOLING,J.- Case called- Deft John De Liso and counsel R. Fischetti Defts and counsel present-deft McNamara not present, counsel present- 73CR442 and 73CR1066- Deft THOMAS MCNAMARA by counsel moves to dismiss the indictment for lack of jurisdiction, other defts join in motion- deft to file papers by 9-17-74- Govt to answer by 9-20-74- Argument on motion for 9-20-74-
9-16-74	Notice of motion for an order dismissing the indictment and Memorandum of law filed- ret. 9-20-74)THOMAS MC NAMARA)
9/18/74	By DOOLING,J.- Memorandum and Order dated Sept. 17, 1974 filed that the govt has in effect taken the pre-trial deposition of a known witness in circumstances not permitted by Rule 15, etc.
9-20-74	Before DOOLING,J.- Case called- Defts and counsel present- Motions argued- granted and denied asdindicated on record- case adjd to 10-7-74 for trial
9-23-74	Letter to all defense counsel from Law Clerk of Judge Dooling and accompanying photocopies of 3 index cards filed
9-23-74	Stenographers transcript filed dated 9-20-74.
9-24-74	Memorandum filed to all defense counsel (dated 9-23-74) from Law Clrk to Judge Dooling and ^{order} is page etc.
9/27/74	Govt's Memorandum in Opposition to deft's motion to dismiss the indictment for want of Federal Jurisdiction filed.
9-30-74	By DOOLING,J.-Memorandum and Order filed denying deft Thomas McNamara's motion to dismiss
10-7-74	Govt's Memorandum of Law filed.
10-7-74	Before DOOLING J - case called - deft John De Liso & counsel R.Fischetti present; deft John McNamara & counsel M. Gillen present; deft Thomas McNamara & counsel L. Meiselman present; deft Alphonse Merrolla and counsel J. Leone present; deft Alphonse Merrolla and counsel M. Seltzer of Legal Aid present. ^{JOHN} counsel for deft McNamara moves for dismissal of the indictment - motion denied - Govt moves to sever as to deft John McNamara - motion granted - Jury selection begun not completed - trial contd to October 8, 1974.

DATE	PROCEEDINGS
10-8-74	Stenographers transcript filed dated 10-7-74.
10-8-74	Before DOOLING J - case called - Defts & attys present - (case as to deft John McNamara severed) Trial resumed - Jurors selected and sworn - Govts opening - Defts De Liso, Thomas McNamara & Alphonse M. Merolla opening - deft Alphonse Merolla waives opening statement. Trial contd to Oct. 9, 1974.
10/9/74	Before DOOLING, J.- Case called-Defts and counsel present-Trial resumed Trial contd to 10/10/74
10/9/74	Stenographers Transcript dated 10/8/74 filed
10/10/74	Before DOOLING, J- Case called- Defts and counsel present- Trial resumed Trial contd to 10/11/74
10-11-74	Stenographers transcript filed dated Oct. 10, 1974.
10-11-74	Stenographers transcript filed dated Oct. 9, 1974
10/11/74	Before DOOLING, J. Case called- Defts and counsel present- Trial resumed Trial contd to 10/15/74
10/15/74	Before DOOLING, J.- Case called- Defts and counsel present- Trial resumed Deft ALPHONSE MEROLLA moves to suppress his identification by agent- Hearing ordered and begun- on motion to suppress-Hearing concluded- Motion to suppress denied- Trial contd to 10/16/74
10/16/74	Before DOOLING, J.- Case called- Defts and counsel present- Trial resumed Trial contd to 10/17/74
10/17/74	Before DOOLING, J.- Case called- Defts and counsel present- Trial resumed Trial contd to 10/18/74
10/18/74	Before DOOLING, J.- Case called- Defts and counsel present-Govt rests- Deft move for judgment of acquittal- Decision reserved- Trial contd to 10/21/74
10-21-74	Before DOOLING J - case called - defts & counsels present - trial resumed - Deft McNamara rests - Deft De Liso moves for the court to inform the Jury that Angelo & Rocco Merolla were acquitted at the prior trial or that that information be elicited from a witness - defts Alphonse M. Merolla & Alphonse Merolla join in deft De Liso's motion - motion denied - defts DE LISO ALPHONSE M. & ALPHONSE MEROLLA rest. Defts all renew motions for judgment of acquittal and for dismissal of the complaint - and to strike the testimony of Harold Goberman - Decision reserved - summation for deft THOMAS McNamara - trial contd to Oct. 22, 1974
10-22-74	Before DOOLING J - case called - trial resumed - defts present with attys - summation for defts - summation for Govt - Jury charged - Order of Suspension signed - Jury held no - Alternative charges discharged - Docket No. DOOLING J - Order of Suspension

- 10-23-74 Before DOOLING J - case called - defts & attys present - trial resumed - Jury deliberations resumed - Order of Sustenance signed - Jury returns with verdicts of not guilty as to defts. DE LISO & ALPHONSE MEROLLA and verdicts of Guilty as to defts THOMAS MC NAMARA & ALPHONSE M. MEROLLA. Jury polled - Jury discharged - Trial concluded - Bail exonerated as to defts DE LISO & ALPHONSE MEROLLA - bail continued as to defts MC NAMARA & ALPHONSE M. MEROLLA Defts MC NAMARA & ALPHONSE MEROLLA moved to dismiss on interstate commerce reserved issues and to set aside the verdict and for Judgment of Acquittal - Decision Reserved - deft MC NAMARA Moves to dismiss the Indictment for lack of prosecution or an immediate trial. Motion to dismiss for lack of prosecution denied without prejudice with leave to renew - case as to deft John McNamara scheduled for trial on Feb. 10, 1975
- 10-23-74 By DOOLING J - Order of sustenance filed -lunch-14 persons.
- 10-23-74 By DOOLING J - Judgment of Acquittal filed (DE LISO & ALPHONSE MEROLLA.)
- 11/7/74 Stenographer's transcripts of 10/21/74, 10/22/74 and 10/23/74 filed.
- 11/7/74 Voucher for expert services filed
- 11/7/74 Stenographers Transcript dated 10/11/74, 10/15/74, 10/16/74, 10/17/74 and 10/18/74 filed
- 1-3-75 Before DOOLING J - case called - deft ALPHONSE MEROLLA & counsel Marion Seltzer of Legal Aid present; deft renews motion to dismiss, Judgment of Acquittal, set aside the verdict, etc. Motions denied. Deft is sentenced to imprisonment for 3 years pursuant to 18:3651; deft to serve 3 months in a jail type institution and execution of remainder of sentence, that is 33 months, is suspended and the deft is placed on probation for 5 years. Clerk is directed to file a Notice of Appeal forthwith on defts behalf without fee. Bail contd pending appeal.
- 1-3-75 Judgment and Commitment and Order of Probation filed - certified copies to Marshal and Probation (ALPHONSE MEROLLA)
- 1-3-75 Notice of Appeal filed without fee (ALPHONSE MEROLLA)
- 1-3-75 Docket entries and duplicate of Notice mailed to the C of A (ALPHONSE MEROLLA)
- 1-3-75 Before DOOLING J - sentence adjd to Jan. 10, 1975 as to deft THOMAS MC NAMARA.

DATE	PROCEEDINGS
-10-75	Before DOOLING J - case called - deft Thomas Michael McNamara & counsel Leonard Meiselman present - deft renews motion previously made - motions denied - Deft is sentenced to 3 years imprisonment pursuant to 18:3651 - deft to serve 3 months to a jail type institution and execution of the remainder of sentence, that is, 33 months is suspended and the deft is placed on probation for 33 months and deft is fined \$5,000. Deft to execute a P.A. Bond of \$10,000. Execution of sentence stayed pending appeal, limits extended to include all of the U.S. Trial date as to deft John McNamara previously set for 2-10-75 adjd without date pending approval of Washington for dismissal.
1-10-75	Judgment and Commitment and Order of Probation filed - certified copies to Marshal and Probation (THOMAS McNAMARA)
1/14/75	Notice of appeal filed (THOMAS McNAMARA)
1/14/75	Docket entries and duplicate of notice of appeal mailed to court of appeals (THOMAS McNAMARA)
1/22/75	Record on appeal certified and mailed to court of appeals

A TRUE COPY	
ATTEST	
DATED	1/27/75
LEWIS CLERK	
BY	<i>[Signature]</i>
DEPUTY CLERK	

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA

INDICTMENT

-vs-

JOHN DE LISO
JOHN MC NAMARA
THOMAS MC NAMARA
ALPHONSE MEROLLA
ANGELO MEROLLA
ROCCO MEROLLA,

Defendants

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ MAY 2 1973 ★
TIME A.M.
P.M.

18 U.S.C. §§1951.

73 CR 442

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THE GRAND JURY CHARGES:

COUNT I

1. That from on or about March 1, 1972, up to and including June 28, 1972, both dates being approximate and inclusive, within the Eastern District of New York, HarMac Contracting Corporation was engaged in the construction and preparation for construction of a building on behalf of the defendant THOMAS MC NAMARA and the Mc Namara Re New Cars, Incorporated which building was to be utilized in connection with the service and sale of new automobiles, parts of which were to be manufactured in other states and transported in interstate commerce to the said building and that for the purpose of performing the aforesaid building construction, the HarMac Contracting Corporation, transported, moved and caused to be moved, articles, commodities and materials, supplies, men and machinery in interstate commerce between various parts of the United States and the State of New York to the site of said building construction within the State of New York.

2. At all times pertinent hereto, Harold Coberman was the sole shareholder in and president of the HarMac Contracting Corporation and a party in the contract with Mc Namara Re New Cars, Incorporated for the construction of the building mentioned in paragraph one, whose interests in and under the contract were assigned to the HarMac Contracting Corporation.

3. From on or about June 1, 1972, up to and including the date of the filing of this indictment, both dates being approximate and inclusive, in the Eastern District of New York, the defendant JOHN DE LISO, the defendant JOHN MC NAMARA, the defendant THOMAS MC NAMARA, the defendant ALPHONSE MEROLLA, the defendant ANGELO MEROLLA, and the defendant ROCCO MEROLLA, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with one another and with divers other persons to the Grand Jury unknown, to obstruct, delay and affect

commerce and the movement of articles and commodities in such commerce by extortion, as that term is defined in Section 1951 of Title 18, United States Code.

4. It was a part of the said conspiracy that the defendant JOHN DE LISO, the defendant JOHN MC NAMARA, the defendant THOMAS MC NAMARA, the defendant ALPHONSE MEROLLA, the defendant ANGELO MEROLLA, and the defendant ROCCO MEROLLA, and other co-conspirators would obtain the property of the HarMac Contracting Corporation and of Harold Goberman, to wit, 1) the sum of \$1300 which was the property of HarMac Contracting Corporation; 2) a trailer-type vehicle, which was the property of Harold Goberman and was utilized in the construction of the building mentioned in paragraph one; 3) a contract release, which was executed by Harold Goberman on June 28, 1972 which released the defendant THOMAS MC NAMARA and Mc Namara Re New Cars, Incorporated from contractual obligations in excess of \$25,000 for a consideration of \$25,000 and; 4) other goods and services as requested by the defendant THOMAS MC NAMARA, which were not contractually required; all of which property was to be obtained with the consent of Harold Goberman and of HarMac Contracting Corporation, such consent to be induced by the wrongful use of physical violence and the threat of physical injury and damage to the person and property of Harold Goberman and of the HarMac Contracting Corporation, by the said defendants and co-conspirators, unless and until the said HarMac Contracting Corporation and Harold Goberman, gave such properties to the defendant THOMAS MC NAMARA and Mc Namara Re New Cars, Incorporated.

(Title 18, United States Code, Section 1951)

A TRUE BILL

Elliot Koe
FOREMAN

Robert A. Morse
ROBERT A. MORSE
UNITED STATES ATTORNEY

2 Members of the jury:

You have heard the evidence in the case and
the arguments of counsel and now must receive the
instructions on the law that governs the case.

You, the jurors, are the sole judges of the facts. You must, however, follow the law as given to you in these instructions and apply it to the facts as you find them from the evidence before you. You are not free, nor am I, to substitute our private judgments as to what the law should be for what the law in fact is.

13 You have been sworn as jurors well and truly
14 to try this case and to render a true verdict. You
15 must therefore exclude from your deliberations all
16 bias and prejudice. You must not permit yourselves
17 to be governed by sympathy or any other considera-
18 tions not founded in the evidence and these instructions
19 on the law.

20 The issues of the fact to be tried are those
21 made by the indictment and the defendants' pleas of
22 "Not Guilty." Bear in mind that the indictment is
23 the formal method of accusing a person of crime; it
24 is not itself evidence that a defendant committed
25 the crime; it is not itself evidence that a defendant

2 committed the crime charge, nor is the fact that
3 the indictment was found any evidence of guilt.

The indictment is found under 1951 of Title
18 of United States Code and it charges a conspiracy
to obstruct or delay or affect the movement of
articles in commerce by extortion. The statute
defines an extortion in the following words:

9 "The term "extortion" means the obtaining of
10 of property from another, with his consent, induced by
11 wrongful use of actual or threatened force, violence,
12 of fear . . ."

Under the statute and in the indictment the word commerce has reference to interstate commerce, that is, between a point in one state and a point in another state. Section 1951 defines the offense with which we are here concerned in the following words:

19 "Whoever in any way or degree obstructs, delays
20 or affects commerce or the movement of any article,
21 ... in commerce, by extortion ... or conspires
22 so to do ... shall be fined ... or imprisoned ... or
23 both."

1 || 3 Charge 2100

Charge

2100

2 consider your verdict, the first paragraph is directed
3 to alleging matter intended to show the nature of
4 the interstate commerce claimed to be involved in the
5 case. It reads in the following language:

6 (Read Paragraph 1)

The second paragraph identifies Mr. Goberman and HarMac. It reads in the following language:

9 (Read Paragraph 2)

10 Paragraph 3 of the indictment is what is
11 called the charging paragraph and it is drawn in
12 language which is very close to the language of the
13 Statute. It reads as follows:

14 (Read Paragraph 3 of the Indictment.)

15 Paragraph Fourth of the indictment finally
16 contains the allegations describing the conspiracy
17 which the Government charged in general terms in
18 Paragraph 3. It reads as follows:

19 (Read Paragraph 4)

20 There are four defendants here and you must
21 consider the case as against each defendant
22 separately. The evidence is not identical as to the
23 defendants and you must evaluate it as it affects
24 each defendant separately. Your verdict need not be
25 the same as to all defendants.

You will observe that the defendants are charged with a conspiracy to commit the offense of the statute. A conspiracy is a combination of two or more persons to accomplish through concerting their actions, some unlawful purpose, or some lawful purpose by concerted use of unlawful means.

The Government is not required to show that the persons charged to have conspired together entered into an express or formal agreement or that they directly by spoken or written words agreed among themselves on what their object or purpose was and agreed on the details of how they would go about accomplishing it.

But the Government must show beyond a reasonable doubt in order to prove a conspiracy that two or more of the persons charged as co-conspirators in some way or manner, whether by tacit arrangement or outspoken exchanges, came to a mutual understanding that they would, by acting together, accomplish an unlawful purpose or together join in using unlawful means to gain a lawful end.

The conspiracy proved must be substantially that described in the indictment. The Government does not, however, have to prove that each and every person named as a defendant or co-conspirator in fact

2 participated in the formation and carrying out of
3 the conspiracy so long as it does satisfy you beyond
4 a reasonable doubt that two or more of the
5 defendants on trial or any one of the defendants on
6 trial and another person charged as a co-conspirator
7 did form substantially the conspiracy described in
8 the indictment and put it into execution.

9 So far as concerns each defendant separately
10 considered, the Government must prove as against him
11 individually that there was a conspiracy and also
12 that the particular defendant whose case you are
13 considering joined in and became a member of the
14 conspiracy.

15 That the Government must prove beyond a
16 reasonable doubt by competent evidence offered against
17 that defendant through witnesses who heard him speak
18 and saw him act and who testify before you to acts
19 and words of that defendant which satisfy you that
20 he did in fact become a member of the conspiracy.

21 Once the Government has shown beyond a
22 reasonable doubt that a conspiracy was formed and
23 the defendant whose case you are considering joined
24 in it, then he is responsible not only for his own
25 words and acts spoken and performed in carrying out
the conspiracy but for the acts and words of his co-

2 conspirators performed and spoken in carrying out the
3 conspiracy.

4 The essential elements of the charge of the
5 indictment all of which the Government must prove
6 beyond a reasonable doubt or else you must acquit
7 the defendant whose case you are considering are the
8 following:

9 First, that physical violence and threats of
10 physical injury were used to induce Harold Goberman
11 to do one or more of the following things, that is,
12 to sign and deliver the \$1,300.00 check, or sign and
13 deliver the bill of sale of the trailer, or to sign
14 and deliver the cancellation of the construction
15 contract;

16 Second, that two or more of the defendants
17 named in the indictment conspired so to use violence
18 or threats of injury to obtain the check or bill of
19 sale or contract cancellation or any two or all three
20 of these instruments from Goberman for the purpose
21 of preventing Goberman and HarMac Contracting
22 Corporation from continuing with the construction
23 of the building for McNamara Buick;

24 Third, that the effect of the use of the acts
25 of the conspirators directed against Goberman would

2 in some degree or manner delay, obstruct or affect
3 in some way interstate commerce or other movement of
4 any articles in interstate commerce; and

5 Fourth, that the defendant whose case you are
6 considering joined the conspiracy knowing its terms
7 and its purpose and that it contemplated the use of
8 physical violence and threats or physical injury in
9 order to induce Harold Goberman to act as the
10 conspirators directed.

11 If the Government proves all four essential
12 elements of the charge against the defendant whose
13 case you are considering, beyond a reasonable doubt,
14 then you will find that defendant guilty.

15 If, however, the Government fails to prove any
16 one or more or all four essential elements beyond a
17 reasonable doubt as against the defendant whose case
18 you are considering, then you must acquit that
19 defendant.

20 In this case the charge is conspiracy and
21 conspiracy ordinarily does not necessarily involve
22 evidence that the alleged conspirators actually went
23 on and did the things that they conspired to do. That
24 is because conspiracy is itself a complete crime even
25 if for some reason it fails to be carried out. I do
 not understand, however, that in this case the

Government contends that it has introduced evidence which would prove conspiracy apart from the evidence of the threats and acts of violence against Harold Goberman and the evidence of the matters connected with and related to the evidence of threats and violence.

Accordingly, the first essential element requires you to determine from all the evidence whether you find that the Government has shown that physical violence and threats of physical injury were used to induce Harold Govermen to sign and deliver the \$1,300.00 check on June 5, 1972, or the trailer bill of sale on that day or to sign and deliver the contract cancellation or release on June 23, 1972.

Note particularly that the Government need not prove both episodes. It is enough if it proves beyond a reasonable doubt that on either one of the two occasions physical violence or a threat of injury was used to get on the one occasion either the check or the bill of sale and on the other the contract cancellation.

If you conclude that the Government has failed to prove beyond a reasonable doubt that physical violence or a threat of physical injury was used to

get the check or bill or sale or contract cancellation, then you must acquit all the defendants.

If you find that the Government has proved this first essential element beyond a reasonable doubt, then you go on to the second element.

The second essential element requires proof that a conspiracy of two or more persons involving at least one defendant was formed to get the checks or bill of sale or contract cancellation from Goberman by violence or threats of injury for the purpose of preventing him and HarMac from continuing with the building construction on Nesconset Highway.

You must, looking at all the evidence, decide whether such a conspiracy was formed. It is not contended that the Government has shown you any formal agreement to do the things alleged, and it need not do so. But it must prove facts and circumstances from which you are able to and do infer beyond a reasonable doubt that defendants, or at least one defendant and another person named as a co-conspirator were concerting their activities to extort from Harold Goberman the check or bill of sale or contract release by using physical violence on him or threats of injury, with the purpose of

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Charge

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3 preventing him and his company from continuing on the
4 McNamara Buick job. In deciding whether the second
5 element has been proved you consider all the evidence
6 of the acts performed by each defendant, the words
7 they used, and the occasions, if any, on which you
8 find that they were present together and acted as a
group.

9

10 If you conclude that the Government has failed
11 to prove such a conspiracy beyond a reasonable doubt,
12 then you must acquit all the defendants. If you
13 find that the Government has proved a conspiracy, then
you turn to the third element.

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The statute requires proof of a delay,
obstruction or some affectation of interstate
commerce or of the movement of articles in interstate
commerce as a result that would naturally flow from the
acts charged.

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It is not necessary for the Government to show
that the defendants or any of them thought about
interstate commerce or the shipment of automotive
parts or building materials from outside New York
to Nesconset Highway or deliberately planned to delay,
obstruct or affect it.

But if the very nature of the acts charged

Charge

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would in any manner or degree delay, obstruct or affect commerce, and you find that the persons, if any, whom you find to have conspired did conspire to commit the acts that would have that affect, then the third element is proved.

So here, if you find that the first and second essential elements have been proved beyond a reasonable doubt, and if you further find that (a) automobile parts were regularly being shipped from outside New York to McNamara Buick-Pontiac in Port Jefferson and were to be shipped to the Nesconset Highway site as soon as the new building was completed, or (b) if you find that building materials from outside New York were ordered specifically for the Nesconset Highway job and had been shipped to the job site for erection as part of the building, and all had been delivered to the job but had not been completely erected on the job site by June 28, then as a matter of law you may find that the Government has established the third essential element beyond a reasonable doubt. That is because any interference with the performance of a building contract involving the use of materials ordered and shipped from out of the state specifically for that building and with

2 the identity of the person or company who would
3 complete the contract performance might be found by
4 you in fact in some way or degree to affect the
5 completion of the building and the time of the shift
6 of deliveries of automotive parts in commerce from
7 Port Jefferson to Nesconset Highway.

8 If you find that the Government has failed
9 to prove the third essential element beyond a
10 reasonable doubt, then you must acquit the defendants.

11 The fourth essential element requires you to
12 determine separately as to each defendant whether
13 that defendant was a willing participant in the
14 conspiracy, whether, knowing its purpose and terms that
15 it contemplated the use of physical violence and
16 threats of physical injury to Harold Goberman, he
17 took an active part in the conspiracy.

18 To determine this question you must review as
19 to each defendant the testimony of those witnesses
20 who gave evidence of that defendant's words and acts
21 as he heard and observed the, and the exhibits, if
22 any, that affect that defendant, and, reviewing that
23 material against all the background of all the other
24 evidence, you must then decide whether that
25 defendant has been shown beyond a reasonable doubt
to have been a member of the conspiracy.

Charge

2110

If so, you will find the defendant guilty, if
not, you must acquit the defendant.

(Insert before last paragraph)

It is not enough for the Government to show that a defendant was present during the commission of a crime, even if it is also shown that he must have known that a crime was being committed. It must be shown the defendant affirmatively associated himself with the criminal venture and concerted his efforts with one or more others to further the objective of the conspiracy.

There has been evidence presented to indicate that Harold Goberman was himself a person who had used violence, threats of violence and dangerous weapons in the past, and that he may have made such threats against Thomas McNamara, and there has been evidence that in the performance of the construction contract the defendants McNamara believed that they could show that Goberman and HarMac had not paid their subcontractors bug had falsely certified that they had paid them and on that basis received substantial progress payments on the job requisitions, and there has been evidence that Thomas McNamara believed that the work was not carried out in

1 Charge
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2111

3 accordance with the plans and specifications and
4 the requirements of the Town Building Code.

5 These are not matters which would afford
6 the defendants or any of them an excuse or defense
7 for violating the law as set forth in Section 1951 if
8 you were to find that these matters were as the
9 defendants say, or, if you conclude that the Govern-
10 ment has failed to show that the defendants'
11 assertions were false assertions as to the facts or
12 as to the defendants' belief.

13 It may be that Harold Goverman and HarMac had
14 very seriously breached the contract with McNamara
15 Re New CArs, Inc.; departed from the plans and failed
16 to meet code requirements, and, that, in consequence,
17 McNamara Re New Cars, Inc., had the right to
18 terminate the contract, to declare it at an end, sue
19 Goverman and HarMac for damages and complete the
20 building by other means.

21 But that would not legitimatize the use of
22 physical violence or threats of physical injury in order
23 to get from Harold Goverman the \$1,300.00 check, or the
24 bill of sale or the signed contract cancellation; to
25 put it another way, would not legitimatize defendants
in attempting by force to coerce Harold Goverman and

2 HarMac into surrendering their right to contest and
3 defend themselves against those charges and to retain
4 their money, property and contract rights until the
5 rights of the parties were adjusted by private,
6 uncoerced agreement between them or by civil
7 litigation.

8 Similarly, if Harold Goberman did resort to
9 violence, he may have exposed himself to prosecution,
10 but that does not excuse the defendants from their
11 duty to comply with the laws, including Section 1951.
12 However, if you were to conclude from the evidence
13 that there were only repeated heated arguments,
14 and threats that were unreal, or were to conclude
15 that, if there was any violence, it arose of violent
16 contract disputes and was not connected with and
17 used to induce the signing and delivery of the check
18 or bill of sale or contract cancellation, that would
19 not amount to the extortion of violence with which
20 Section 1951 deals.

21 To repeat, what is charged and what must be
22 shown is that physical violence and threats of
23 physical injury were used to induce Harold Goberman
24 to sign and deliver the check or bill of sale or
25 contract cancellation and if you are satisfied that

1 Charge

2113

2 the Government has proved that, it is immaterial that
3 Goberman may himself be a violent man and at certain
4 times may have uttered threats of violence against
5 Thomas McNamara.

6 And an attempt to suppress evidence made by a
7 defendant after a crime has been committed is not,
8 of course, sufficient to establish that defendant's
9 guilt.

10 If, however, you conclude here that a
11 defendant made a conscious effort to suppress a
12 document that he thought might be used against him,
13 you may consider the evidence of any such attempt,
14 along with the other evidence in the case in determin-
15 ing the issue of his guilt or innocence. Whether
16 or not an attempt at suppression of evidence shows a
17 consciousness of guilt and the significance to be
18 attached to any such attempt, are matters for you to
19 determine.

20 When a defendant knows that a matter is the
21 subject of a criminal investigation and voluntarily
22 and intentionally offers an explanation intended and
23 tending to show his innocence of wrongdoing or to
24 disassociate himself from a suspected wrongdoer, and
25 the explanation or statement is shown to you to be

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3 false, you may consider whether the offering of such
4 a false statement is a circumstance indicating
5 consciousness of guilt.

6 Ordinarily, it is reasonable to infer that an
7 innocent person would not think it necessary to
8 invent or fabricate an explanation or make a state-
9 ment tending to establish his innocence that was untrue

10 Whether or not the evidence does demonstrate
11 the making of a consciously false statement is for you
12 to say and whether the fact or the making of such a
13 statement if you find that it was made and was false
14 points to a consciousness of guilt and the signifi-
15 cance to be attached to such evidence are matters
16 exclusively within your province to determine.

17 Proof beyond a reasonable doubt is not proof
18 to an absolute certainty. Few things in life can be
19 so proved. Proof beyond a reasonable doubt is such
20 proof as you would be willing to rely and act upon
21 in the most important of your own affairs.

22 If, after carefully weighing all the evidence
23 you have an abiding conviction of the truth of the
24 charge such that you feel conscientiously bound to
25 act upon it, then you would be free from reasonable
doubt.

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Charge

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If, however, after weighing all the evidence,

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you have such a doubt as would cause prudent persons
to hesitate before acting in matters of importance
to themselves, such a doubt would be a reasonable
doubt.

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That does not mean that each bit of the
Government's evidence must be found by you to be
true beyond a reasonable doubt. It means rather that
in sum total the Government's evidence must satisfy
you beyond a reasonable doubt as to each element of
the crime charged, or you must acquit.

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A reasonable doubt may arise not only from the
evidence produced, but also from the lack of evidence.
Since the burden of proof is always on the Government
a defendant has the right to rely on the failure of
the Government to prove any essential element of the
charge.

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A defendant may rely too on evidence brought
out on his cross-examination of witnesses called by
the Government. The law does not impose on a
defendant the burden or duty of producing any
evidence.

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Under our law a defendant has a constitutional
right to remain silent. No inference unfavorable to

1 Charge

2116

2 the defendant can be drawn from that fact. Your
3 deliberations accordingly must exclude consideration
4 of or reference to the matter and must concern itself
5 solely with the evidence before you.

6 A defendant is presumed to be innocent and
7 that presumption accompanies him/her throughout the
8 trial. It continues unless you are satisfied on
9 all the evidence that the Government has proved
10 defendant's guilt beyond a reasonable doubt.

11 I will not summarize the evidence. It has
12 not been complex and the issues of fact are plain.
13 You have heard twenty-seven witnesses, to name them
14 in the order in which they testified; Richard
15 Anderson, Frank Cifarelli, George Little, Harold
16 Goberman, Alex Guiazdowski, Gary F. Taibbi, Edward
17 Tew, John G. Ehrlich, Biaggio Punturo, Desmond
18 O'Sullivan, Allen Goberman, Richard M. McMullen,
19 Emanuel C. Sfaelos, Warren M. Brady, Jeremiah Murphy,
20 Thomas Patrick Gill, John Timothy Shea, John Sini,
21 Sandra Di Nuzio, Majes V. Pavese, George W. Koch,
22 Dorothea H. Tomaselli, Andrew S. Camarda, James
23 McNamara, Kenneth Brown, James Freda and Eugene W.
24 Brosi. Sixty exhibits have been received.

25 I have emphasized that you must decide the

2 case on the evidence.

3 The evidence is the testimony of these
4 witnesses, the exhibits received in evidence, and
5 the facts that have been stipulated.

6 Statements and arguments of counsel, and
7 answers stricken from the record are not evidence.

8 The evidence includes, of course, what is
9 brought out on cross-examination as well as what is
10 testified under direct examination.

11 Your verdict must be based on the evidence.
12 But in your consideration of the evidence you are not
13 limited to the bare words of the witnesses and the
14 bald facts that you find have been proved. The
15 evidence includes the inferences reasonably to be
16 drawn from the testimony which you hear and the facts
17 which you find have been proved.

18 There are two types of evidence from which you
19 may lawfully find that a fact has been proven. One
20 is direct evidence, such as the testimony of an
21 eye witness to his observations of the facts to be
22 proved. The other is circumstantial evidence, the
23 proof of facts and circumstances which rationally
24 imply the existence or non-existence of some other
25 fact because such other fact usually and reasonably

2 follows according to the common experience of
3 mankind. Thus, if you see people coming into a
4 building shaking out dripping umbrellas, and others,
5 about to go out-of-doors, turning back toward their
6 offices, you infer from these circumstances that it
7 is raining outside.

8 Or, while you can see from your window that
9 the sky is full of clouds and the streets are wet,
10 and you see also that passing cars are not using
11 their windshield wipers and passersby are carrying
12 their umbrellas folded under their arms; you infer
13 from those circumstances that it is not raining.

14 As a general rule the law makes no distinction
15 between direct and circumstantial evidence. If the
16 evidence, as here, is in part indirect and circum-
17 stantial, then you apply to it, along with all the
18 other evidence, the same standard of proof; it must,
19 taken with the other evidence, satisfy you of the
20 defendant's guilt, beyond a reasonable doubt, or else
21 you must acquit.

22 You are the sole judges of the credibility of
23 the witnesses. The motives and state of mind of
24 each witness as they appear to you and thecircumstances
25 and inducements under which the witness tesfited

are to be taken into account. Consider any relation each witness may bear to either side of the case and the manner in which the verdict might affect him.

You may consider the appearance and manner of each witness on the witness stand, the witness' apparent candor or lack of it, and the character of the testimony given, whether the testimony contains inconsistencies or discrepancies, whether it is intrinsically credible or seems to you in whole or part improbable, and whether it conflicts with other testimony or is consistent with other testimony in the case.

In weighing the effect of conflict or discrepancy consider whether it pertains to a matter of importance or to unimportant details and whether it seems to you to result from innocent error or from falsehood. If you find a witness has been mistaken or untruthful, in all or in part of the testimony given, then you may give the testimony of that witness such credit, if any, as you think it deserves in the light of the nature of and the extent of the defects that you find in it.

Evidence that at an earlier time a witness made a statement inconsistent with or contradictory of that witness's testimony here in your presence justifies

you in rejecting the testimony given before you on that point but does not require you to reject the testimony.

You must decide in the light of the inconsistency and all the other factors bearing on the credibility of the testimony whether you do or do not accept it as true. You do not, however, take the earlier statement as establishing the true facts; rather, you treat it as at most nullifying the testimony given in court here.

If you conclude that a witness has knowingly testified falsely concerning any material matter, you have the right to distrust that witness' testimony in other particulars. You may reject all the witness testimony or give it or parts of it the credence you think it deserves.

In considering the credibility of a witness you may take into account the fact that he has been previously convicted of a crime or crimes. You may also take into account evidence that a witness has admitted the commission of other acts that were in violation of the law.

I have sought not to comment on the evidence or to give any impression as to my own view, if I have one, of the relative weight of the evidence.

1 Charge

2121

2 If I have done so, however, you may disregard
3 it entirely for you are the sole judges of the facts.

4 From time to time in the course of the trial
5 objections have been made and rulings on evidence
6 given. Draw no inferences from the comparative
7 frequency of objections of one or the other side or
8 from the comparative record in having objections

9 sustained, disregard the question and draw no
10 inferences from its wording about the answer that
11 might have been given.

12 Where an objection is overruled, evidence then
13 received has no special weight just because
14 unsuccessfully objected to.

15 Your verdict must be unanimous.

16 It is your duty as jurors to consult with one
17 another and to deliberate with a view to reaching
18 agreement if you can do so without doing violence
19 to individual judgment. Each of you must decide
20 the case for yourself but do so only after an
21 impartial consideration of the evidence with your
22 fellow jurors.

23 In the course of your deliberations do not
24 hesitate to reexamine your own views and change
25 your opinion if convinced it is erroneous. Your

task is one of conscience, and pride of opinion has no place in matters of conscience. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

The form of your verdict, which must be given separately for each defendant, is simple. Your verdict must be either Guilty or Not Guilty, it must be given separately as to each defendant, and it must be unanimous as to each defendant.

Your verdict need not be the same as to all defendants.

Your verdict as to each defendant will be delivered orally here in open court by your foreman in response to questions which the Deputy Clerk of Court will address to him.

You are not partisans -- you are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

When you have reached a verdict and are ready to report, simply advise the Marshal that you have reached a verdict without disclosing orally or in writing what your verdict is.

1 Charge

2123

2 Your verdict must not be disclosed to anyone
3 before you deliver it orally in the Court Room in
4 response to the questions of the Clerk of the Court.

5 If you wish to communicate with the Court,
6 do so in writing, using the Foreman, Juror No. 1, as
7 your intermediary and representative. Notify the
8 Marshal when you have any such communication.

9 There will now be a short recess during which
10 counsel will review the charge with me to make
11 certain that nothing has been omitted or misspoken.
12 Then you will retire to the jury room to deliberate
13 your verdict.

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15 (Cont'd on next page.)

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Charge

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2 I would ask you not to initiate your discussions yet
3 because you have the three alternates with you.
4 As soon as the case is given to you and the alternates
5 have been excused you will begin your deliberations.

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CC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

JOHN DE LISO, JOHN MC NAMARA,
THOMAS MC NAMARA, ALPHONSE MEROLLA,
ANGELO MEROLLA, ROCCO MEROLLA,
Defendants.

73 CR 442

MEMORANDUM
and
ORDER

UNITED STATES OF AMERICA,

-against-

ALPHONSE MEROLLA
AKA "FAT NICKY," "PENGUIN"

Defendant.

X

1. Defendant* Thomas McNamara moves to dismiss the indictment on the ground that the Court has no jurisdiction (contending that the construction contract had been terminated by notice given under Section 14.2 of the contract on June 24, 1972, and that the town had suspended work on the job by order posted on the job site on June 21, 1972, so that no "affect" on commerce, or on the movement of any articles in commerce, could have occurred on June 28, 1972) and moves also for an examination of the Grand Jury minutes.

On the ground made, the motion must be denied. The

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notice of June 24 could not by its sending and receipt terminate the contract. Even if production of the architect's certificate was excused, the most that McNamara re-New-Cars, Inc., could do by notification would be to assert its position, as the letter plainly did. It could not unilaterally establish its assertion as the legal right of the matter. The letter was not self-fulfilling or self-executing. Hence, the transaction of June 28 was addressed to getting HarMac to relinquish the job. For all that appears, the notice sent by McNamara re New Cars, Inc., could have been an unwarranted repudiation of contract duties that was a breach - and an element in a course of action that interfered with the HarMac performance.

The town's order was, it appears, a "hold" order, requiring correction of unsafe conditions before continuing construction.

The further question:

whether, assuming that the construction contract itself was made in contemplation of, and if performed would have brought about, (a) the interstate delivery for local erection of substantial quantities of building materials, and (b) the utilization of the completed

structure for the receipt, storage and resale of automotive parts manufactured and shipped from other states,

would using violence to get

from Goberman the \$1,300, the trailer, and the contract release be acts sufficiently connected with that commerce to support the indictment under Section 1951? -

that is the question to which

attention was invited. United States v. Archer, 2d Cir. 1973,

486 F.2d 670, 677-678, cited by defendant's counsel, dealing

with 18 U.S.C. § 1952, and United States v. Maze, 1974, 414

U.S. 395, 399, dealing with 18 U.S.C. § 1341, are both con-

cerned with the question whether the activity furnishing the

basis of federal jurisdiction (legislative or judicial) was

sufficiently closely and fully connected with the alleged

misconduct indicted to support the indictment. In Archer the

inquiry was whether the interstate or foreign telephone calls

were "of casual and incidental occurrence" or integral to the

misconduct indicted; in Maze the question was whether or not

the interstate mailing of bills in order to be paid by inter-

state remittance was merely a consequence or was an integral

part of Maze's scheme of using a stolen credit card to get

lodging at motels en route from Kentucky to California.

Here, the charge is conspiracy to obstruct, delay and affect commerce and the movement of articles in commerce by extortion, i.e., by obtaining property with consent but consent to be induced by wrongful use of violence and threats of injury to person and property. The evidence is, in the main, that HarMac bought building materials from local suppliers who had it shipped in from out of state either to the job site or to their local storage yards, that most of the shipment was complete, but not the installation, and that, of course, the new facility would import vehicles and parts from other states for resale. The conspiracy was not aimed at commerce: no one conspired to hold up interstate shipments until HarMac was ready to release its contract rights, surrender its trailer, and pay over \$1,300. In some sense what was done (if done as Mr. Goberman testified) did "affect" commerce, but affected it at one remove at least if not at the second remove. Is that enough today? The thinking in Maze and Archer suggests that the decided cases under Section 1951 require serious re-examination.

While the commerce motion must be denied on the ground made, the broader commerce question remains open. The evidence may or may not help us on it.

In any event, as made clear at the hearing, requests to charge on the commerce point are welcome. Is the commerce point in this case, in light of the evidence, a pure question of law that we need not trouble the jurors with? If there are one or more convictions and an appeal, will a verdict that includes a theoretical resolution of commerce - fact questions be an advantage or an embarrassment? Should the commerce "facts" be stipulated to isolate the commerce issue where both sides can shoot at it on the law?

2. The motion of defendant* John McNamara to dismiss the indictment for prosecutorial misconduct in allegedly tampering with the testimony of a witness who had been called as a defense witness and who could be expected to be called by the defense on re-trial is denied. Assuming that Miss Tomaselli was called in a new matter (# 741,240, but, still, violation of Section 1951), perhaps re-indictment to include the second Alphonse M. Merolla (not subornation of perjury, Section 1622), the evidence adduced through her does not seem appropriate. But, while calling Miss Tomaselli might be thought to have been inadvisable and to go to the very farthest border of the permissible, it does not amount in evident purpose or in probable effect to prejudicial misconduct. The motion

is denied.

3. The motion of defendant* John McNamara to suppress the use of Miss Tomaselli's Grand Jury testimony at the re-trial is denied. The testimony cannot be effectively used unless to impeach, since Miss Tomaselli is not a defendant, and even if suppressed, would remain available under Walder v. United States, 1954, 347 U.S. 62, 65-66, and Harris v. New York, 1971, 401 U.S. 222.

4. It is suggested that if the Government calls Miss Tomaselli as a witness it be instructed not to examine her as a hostile adverse witness. The point is hypothetical, but, as in every case, whether a witness can be examined as adverse and hostile depends on what happens at the trial. No presumption that a witness is adverse and hostile flows from the fact of employment by a firm owned in whole or part by one or more defendants.

5. Defendant* Thomas McNamara moved to examine the Grand Jury minutes to determine whether or not the June 24 notification and the Town's posting of its order were facts presented to the jury, and, perhaps, for other purposes. The ground for disclosure of the Grand Jury minutes has been

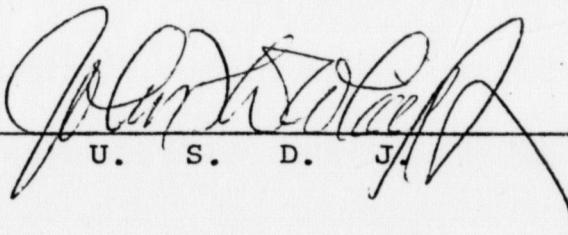
made out. The motion is denied.

It is so ORDERED.

Brooklyn, New York

September 27, 1974.

U. S. D. J.



* All defendants have joined in all the motions.

NUUUT

THIS STRUCTURE OR PREMISES VIOLATES THE FOLLOWING LAW

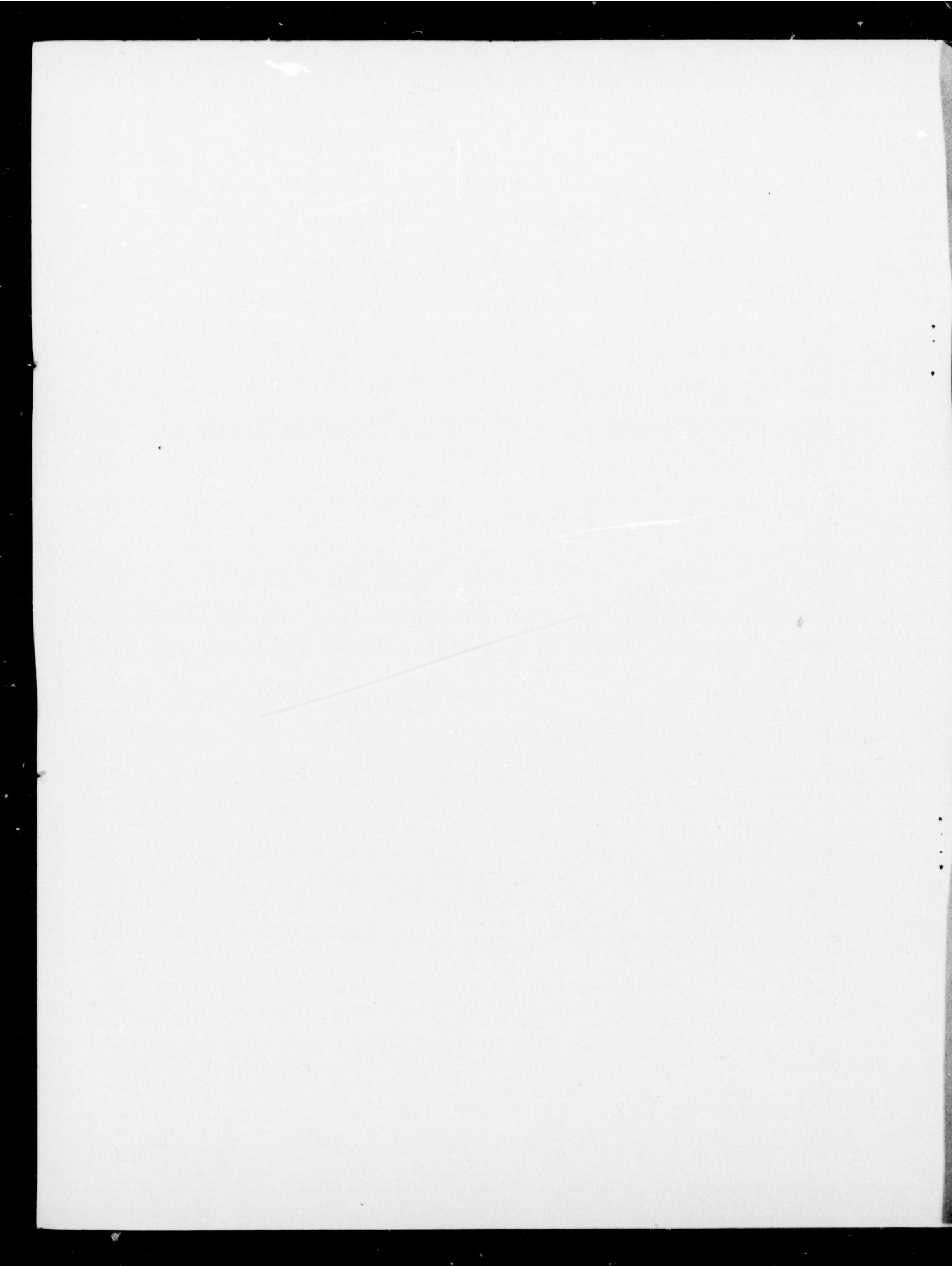
- ZONING ORDINANCE HOUSING ORDINANCE
 STATE BUILDING CODE MULTIPLE RESIDENCE LAW
 OTHER LAWS

Part

ARTICLE 3 SECTION C-301 PARAGRAPH A

**DO NOT CONTINUE WITH CONSTRUCTION OR
USE OF PREMISES UNDER PENALTY OF FINE
AND IMPRISONMENT OR BOTH**

TOWN OF BROOKHAVEN BUILDING DEPARTMENT



CERTIFICATE OF SERVICE

March 2, 1975

I certify that a copy of this brief and appendix
has been mailed to each of the following parties:

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